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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1963~~ 1964

No. 211

MILLIE VECCHIO, Individually and as Administratrix of the Goods, Chattels and Credits of Mario Vecchio, deceased, 322 Wilson Avenue, Brooklyn 21, New York,

Petitioner,

vs.

ANHEUSER-BUSCH, INC., a Missouri Corporation, with offices at 200 State Highway, Route No. 1, Newark, New Jersey,

Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, FOR A SUMMARY REMAND FOR A HEARING *EN BANC*

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We do not agree with many statements in the respondent's Statement of Facts. That statement not only differs with the facts in the Extracts From Stenographer's Minutes (Petition, pp. 39-44) but also with the facts as stated in the majority opinion (Petition, pp. 28-31) and the minority opinion (Petition, pp. 36-37).

POINT I

The majority of the Court of Appeals had no power to grant judgment to respondent in the absence of a motion by it for judgment required by Rule 50(b) of Civil Procedure.

Under its Point II, respondent completely failed to answer the question of the lack of power in the majority of the Court of Appeals to grant judgment to the defendant on a new ground in the conceded absence of a motion for such judgment by it, required by Rule 50(b) of Civil Procedure.

The question of such power is not novel, but it was squarely considered and clearly decided by this Court in *Globe Liquor Co. Inc.* v. *San Roman*, 332 U. S. 571, and in *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, and in numerous decisions by many Courts of Appeals following the interpretation of Rule 50(b) made by this Court in said decisions.

The respondent argues that these two decisions do not apply because the respondent had a jury's verdict in its favor, although the Court of Appeals unanimously held that said verdict was obtained by it in violation of due process of law under the Fifth Amendment to the Federal Constitution and in violation of fair trial by jury under the Seventh Amendment. The Court of Appeals refused to affirm respondent's judgment based on jury's erroneous decision. This argument was rejected by this Court in the *Globe Liquor Co.'s* case, *supra*, where this Court said at page 573:

> "By its terms the rule applies equally to cases where the verdict returned by the jury was not directed, as in the Cone case, or was directed, as in this case."

The cases cited by us in the petition (at pp. 15-16) show that the Circuit Courts of Appeals uniformly held that the fact that the party entitled in their opinion to a judgment had actually obtained a judgment in the District Court is immaterial to the lack of the power in the Courts of Appeals to grant judgment to a party which failed to comply with Civil Procedure Rule 50(b). In both *Dunlop Tyre & Rubber Corp.* v. *Thompson*, 273 Fed. (2) 396, and in *Brown* v. *Alkire*, 295 Fed. (2) 411, the Circuit Courts of Appeals for the Eighth and Tenth Circuits held that the parties who obtained judgments in the District Courts were entitled to judgments on different grounds. Yet, both courts expressly held that because of this Court's interpretations in the *Globe* and *Cone* cases, *supra*, of said Rule 50(b), they had no power to grant judgment to the successful party in the District Court and were compelled to order merely a new trial, because of the absence of a motion under Rule 50(b) for judgment in the District Court.

The respondent argues that the conceded absence of a motion by it for a judgment in the District Court is a technicality. As this Court pointed out in the *Globe* and *Cone* cases (Petition at pp. 14 and 15), the question depends on the fundamental difference in the federal judicial system of the functions of the District Courts and the Courts of Appeals. The District Courts see and hear the witnesses and all the proof. This Court deemed that the mere examination of papers on the appeals is not a sufficient qualification to determine a right to a new trial. The Advisory Committee on Rules of Civil Procedure in 1946, recommended a modification of the Rule 50(b) which modification would have given the same power to the Court of Appeals as to the District Court to entertain a motion for judgment or for a new trial, but this Court refused to approve such amendment. (See *Cone* v. *West Virginia Paper Co.*, 330 U. S. 212, 218.)

The respondent claims that before the petitioner is entitled to a new trial, she must show some grounds therefor.

The unanimous opinion of the Court of Appeals below that the charge of the District Court to the jury here violated the Fifth and Seventh Amendments to the Constitution and possibly resulted, therefore, in an erroneous decision by the jury in respondent's favor is surely sufficiently good ground in itself for granting a new trial to the petitioner.

The majority of the Court of Appeals granted judgment to respondent solely because of the alleged assumption of risk by petitioner's deceased (Petition at p. 34). This Court repeatedly held that the question of assumption of risk is always a question of fact and not a question of law (*Tiller* v. *Atlantic Coast Line R. R. Co.*, 318 U. S. 54, 67-68—Petition at p. 17). The New Jersey cases are to the same effect (*Meny* v. *Carlson*, 6 N. J. 82; *Beck* v. *Monmouth Laundry Corp.*, 137 N. J. L. 268—in the petition at pp. 24 and 25). Are not these decisions another good ground for vacating summary judgment granted to respondent as a matter of law by the Court of Appeals.

As the minority of the Court of Appeals pointed out (Petition at p. 37) the snapping of the scaffold's cable was due to accelerated corrosion because of steam and sulphurous acidic vapors from the smoke chimneys and plant vents of the defendant. Art Kraft had nothing to do with the control or operation of these chimneys and vents (Petition, p. 30). Hence, the question of defendant's negligence in failing to moderate or to eliminate those vapors and their effect on the corrosion of the cable, the cause of the deceased's death, is clearly for the jury.

The unanimous decision of the Court of Appeals was that the scaffold was owned by the respondent (Petition at p. 31). It was part of and attached to respondent's ten-story building, part of its plant (Petition, p. 29).

In *Huston* v. *Dobson*, 138 App. Div. 810; 123 N. Y. S. 892, the Court said at page 896:

"So, the facts that the defendant furnished an improper scaffold not safe for the use for which it was designed, the fall of that scaffold, the fall of the deceased from the place at which he was working which followed the fall of the defective scaffold, was evidence which required the question as to whether the death of the deceased was not due to the negligence of the defendant to be submitted to the jury."

In *McGlone* v. *William Angus, Inc.*, 248 N. Y. 197; 161 N. E. 469, the Court said at page 199:

"There is no dispute apparently that this planking or scaffold gave way, and that the plaintiff was dropped to the cellar.

Negligence is gauged by the ability to anticipate. The Angus Company apparently knew that its men were not the only ones at work upon the building. As the iron work went up, the stone work soon followed. Both classes of employees were working together. When the Angus Company placed boards over the iron beams forming a scaffold or flooring for its derricks, could it reasonably anticipate that other workmen on the structure would walk over the flooring? On the evidence this was a question for the jury."

In *Fitzwater* v. *Warren*, 206 N. Y. 355; 99 N. E. 1042, the Court said at page 358:

"Moreover, in this case the assumption of risk was a fair question of fact for the jury * * *.

"To establish the defense of assumption of risk the burden of proof rests on the defendant (Dowd v. N. Y., Ontario & W. Ry. Co., 170 N. Y. 459), and though the defect be apparent, if it may require judgment not possessed by the ordinary observer or servant to realize the hazard caused thereby, the risk is not assumed. (Davidson v. Cornell, 132 N. Y. 228; Welle v. Celluloid Co., 175 id. 401.)"

In this case, the respondent knew at all times that the scaffold constituted a sole way of access to the sign, the place of work of the deceased, and the defect in the scaffold was hidden and concealed and was unknown to the deceased.

POINT II

The majority of the Court of Appeals ignored controlling limitations on the rule of assumption by workman of incidental hazards in his work.

The Court of Appeals unanimously held that the respondent was the owner of the scaffold (Petition at p. 31).

The record shows that the maintenance crew of Art Kraft visited the premises of the defendant for the maintenance work for a few hours about every six weeks. In other words, for 355 days every year the sign and the scaffold were in the exclusive possession, control and ownership of the defendant (Petition at p. 5). It is conceded here, that the scaffold was the only means of approach to the sign for doing maintenance work on it. The deceased was a master electrician and there is no proof that deceased did any other work except electrical maintenance work on the sign. There is no proof that he ever did any work at all on the scaffold or on its cables.

The majority of the Court of Appeals apparently assumed the elementary law that the owner's obligation to provide a safe place to work for the employees of the independent contractor employed by the owner includes the obligation to keep the ways and approaches to the place of work in a safe condition (*Iacono* v. *Frank & Frank Contracting Corp.*, 259 N. Y. 377; 182 N. E. 23; *De Lee* v. *Pardy Construction Corp.*, 249 N. Y. 103; 162 N. E. 599; *Chaney* v. *N. Y. City Transit Authority*, 12 App. Div. (2) 261; 208 N. Y. Supp. (2) 205). The majority of the Court of

Appeals held that the respondent was entitled to the granting of its motion for a directed verdict because the death of plaintiff's deceased was due to "hazards which are incidental to or part of the very work which the independent contractor has been hired to perform" (Petition at p. 34). The minority of the Court of Appeals dissented from the application of said rule to the petitioner's deceased because the majority disregarded three important limitations of said rule excluding its application to the facts herein.

The first of these limitations is that plaintiff's deceased is not chargeable with the results of a hazard which he was not employed to correct. The law of New Jersey and other common law states is that the employee undertakes only such hazard in his employment as is known to him and as he, himself, voluntarily assumes. The employee does not assume hazards unknown to him, even if such hazards are known to his employer or to his co-employees. In this case, the deceased had nothing to do with the maintenance of the scaffold and its cables. The hazards incurred by Art Kraft or its employees engaged in maintaining the scaffold, or by the failure of the respondent as owner to check on poor maintenance of the scaffold's cables by Art Kraft, are not chargeable to plaintiff's deceased. (See New Jersey cases at p. 20 of the Petition.)

The same law is in force in other common law states. Thus, in *Caspersen* v. *La Salla Bros.*, 253 N. Y. 491; 171 N. E. 754, the owner was held liable for injuries to an employee of independent contractor because a shaftway through which the employee passed on the way to his work was unsafe. In holding the owner liable, Cardozo, Ch. J., said at pages 494-495:

> "The defendant is not chargeable with the negligence of the masons, the servants of the subcontractor. It is chargeable with its own negligence in failing to guard the ways against perils unknown to the worker."

The second limitation on the general rule relied on by the majority of the Court of Appeals is that of non-delegable duty of the owner to provide a safe approach to employees of the independent contractor to the place of work (*Wohlfron* v. *Brooklyn Edison Co., Inc.*, 238 App. Div. 463; 265 N. Y. Supp. 18, aff'd 263 N. Y. 457, 189 N. E. 691, is not eliminated by the owner's use of an independent contractor to do the maintenance or repair work on the place of work or on the approaches to it.

This rule was recently reaffirmed in New Jersey in *Schwartz* v. *Zulka*, 70 N. J. Super. 256, where the Court said at pages 261-263:

> "The rule as to the duty of due care by a land occupier requires additional refinement, however, in application to a situation where the occupier, whether an owner or a general contractor in control of a building under construction, is having repair, maintenance or construction work done thereon by an independent contractor. Since the work contracted for may be faulty and constitute a hazard to invitees coming onto the premises thereafter, particularly employees of subcontractors, see Meny v. Carlson, 6 N. J. 82, 95 (1950), there may under appropriate circumstances be a duty of inspection by the land occupier of the work of the subcontractor, default as to which and consequent injury to an invitee may subject the occupier to liability to the injured invitee. Prosser, Torts (2nd ed. 1955), Sec. 64, pp. 358-359; Harper and James, Torts, sec. 26.1, p. 1362, sec. 26.11, p. 1405; 2 Restatement, Torts, sec. 412 pp. 1114-18; see Bergquist v. Penterman, 46 N. J. Super. 74, 85 (App. Div 1957), certif. den. 25 N. J. 55 (1957); Blankley v. Nostrame, 30 N. J. Super. 405, 407-8 (App. Div. 1954)."

Other common law states have repeatedly recognized and enforced the same rule. In *Gulf Oil Corp.* v. *Bivins*, 276

Fed. (2) 753, cert. den. 364 U. S. 835, the Court of Appeals for the Fifth Circuit said at page 758:

> "We are persuaded by both precedent and principle that the owner or occupier of particular property has a duty to warn the employee of an independent contractor who has undertaken to do work on the property, of dangers that are hidden or inherent in that property, * * *."

In *Madden* v. *Minneapolis & St. Louis Ry. Co.*, 32 Minn. 303; 20 N. W. 318, the Court said at page 306:

> "There is no difference as to the duty of the master and the assumption of risk by the servant, between an employment to make repairs and any other employment. In all cases the servant is held to take on himself the risks necessarily incident to the employment, unless, perhaps, they be latent and known to the master, but not known to, nor by the use of proper diligence discoverable by the servant; and in no case does he take on himself risks that arise by reason of neglect on part of the master, unless they be known to him or by the use of proper diligence are discoverable by him."

In *Welle* v. *Celluloid Co.*, 175 N. Y. 401, the Court said at pages 404-405:

> "Though the case is a close one we think the nonsuit was erroneous. Doubtless, the plaintiff by his long service, three or four years, assumed the risks which the general plan or method of the operations of the defendant involved * * *. But the plaintiff did not necessarily assume the risk of defective or improper appliances in that plan or method of work, unless the defect was obvious or he had so long used the appliance as to be chargeable in law with knowledge of its insufficiency. He had the right to rely on the presumption that the master had done his duty in furnishing safe and suitable appliances."

In *Martin* v. *DesMoines Edison Light Co.*, 131 Ia. 724; 106 N. W. 359, the Court said at page 733:

> "It would be a most unreasonable rule, if the act of a servant in undertaking an unusually dangerous service for the master should relieve such master from all obligations to exercise reasonable care for the servant's safety. The servant may properly be held to the risk of the extraordinary service; but he never takes the risk of the master's negligence under any circumstances, save when he knows of such negligence or as a reasonably intelligent person ought to have known of it and chooses to remain in the service."

In *Engstrom* v. *Ashland Iron & Steel Co.*, 87 Wis. 166; 58 N. W. 241, the Court said at page 171:

> "But it is obvious that the duties of the plaintiff and other employees of the defendant required them, from time to time, to go upon the roof at or near that place, and that the plaintiff was in the pursuit of his duties at the time he so went there. The defendant was bound to furnish the plaintiff with a reasonably safe place in which to work, or to notify him of any latent or unforeseen danger. Hulehan v. G. B., W. & St. P. R. Co., 68 Wis. 520; Nadau v. White R. L. Co., 76 Wis. 127. Here the danger was hidden, and could only be known to those who understood the effect of leaving ashes, dirt, etc., to accumulate upon the roof for a long time."

The third limitation on the general rule relied on by the majority of the Court of Appeals is that in order to imply an assumption of risk by an employee, the risk or the hazard must exist at the time the employee was engaged as such by his employer. Here, plaintiff's deceased was engaged in 1952 when the cables were new, and no hazard in their use existed at all, nor for many years thereafter. Since the assumption of risk is a purely contractual obli-

gation, it does not exist where, as in this case, the hazard is created a long time subsequent to the making of the contract of employment. In *Rivers* v. *Krasowski*, 303 Mass. 409, the Court said at page 412:

> "It is not clear on the record whether during those months there were successive contracts of employment made at the beginning of each of the short periods that he worked. But the auditor found that, during the last three months preceding his injury, the plaintiff worked regularly as business and weather conditions permitted. We think the inferences were warranted that during this latter period he worked under a continuing contract of employment and that the defect that caused his injury was not in existence when the period began. A finding was warranted that there was no contractual assumption of the risk by the plaintiff."

In *McCauley* v. *Norcross*, 155 Mass. 585; 30 N. E. 464, the Court said at page 216:

> "The defendant contends that the plaintiff contractually assumed the risk arising from the existing conditions. *Sylvain* v. *Boston & Main Railroad*, 280 Mass. 503. But it appears from the evidence that the floor was not greasy when the plaintiff first went to work. It is apparent, therefore, that the source of danger arising from the work could not have been within the contemplation of the parties when the relation of master and servant began. Consequently there was no contractual assumption of risk. *Demaris* v. *Van Leeuwen*, 283 Mass. 169, 171."

In *Martin* v. *DesMoines Edison Light Co.*, 131 Ia. 724; 106 N. W. 359, the Court said at page 735:

> "When a servant enters the employment of a master, he is presumed to have taken into considera-

tion such danger and exposure to injury as is naturally incident to or connected with such service, even when the master has exercised all reasonable care for his servant's safety. The risk thus arising, which involves no element of negligence on the part of the master, the servant takes upon himself and his wages are considered to be his full compensation for the danger thus incurred as well as for the actual labor of his hands."

In *St. Louis, etc., Ry. Co.* v. *Naylon*, 17 Cols. 501; 30 Pac. 249, the Court dealing with a defect in construction done after plaintiff was employed for some time, said at pages 503 and 504:

> "He had an undoubted right to expect a degree of care and skill equal to that ordinarily exercised during a progress of railroad construction. Colo. Midland Ry. Co. v. O'Brien, 16 Colo. 219. The record shows very clearly that such care was not taken in the present instance and that the accident resulted from its omission. The single spiking of three ties and entire failure to spike the fourth tie upon such a curve appears by the evidence to have been negligence which exposed appellee to an extraordinary and unusual hazard—a hazard that was not contemplated in his employment."

Finally we submit, that the assumption of risk rule invoked by the majority of the Court of Appeals to dismiss the complaint herein is a defense not open to the respondent. Such defense is based on and is presumably a part of an employment contract. The plaintiff's deceased had no contract whatsoever with the respondent. This action is based upon negligence of the respondent in providing a sole means of access to the place of work in the respondent's plant with a concealed and unknown fatal defect. This action is based on tort, and not on contract. It is

based on the common law duty of the owner of the premises where the work is to be performed to provide a safe approach to the place of work (see cases, *supra*, at p. 6).

In *Hess* v. *Bernheimer & Schwartz Brewing Co.*, 219 N. Y. 415; 114 N. E. 808, Judge Pound speaking for the unanimous Court said at pages 418 and 419:

> "If the employer furnishes a ladder or a scaffold for the contractor's employees to work on he must be careful to furnish a safe appliance (Huston v. Dobson, 138 App. Div. 810; Fuller v. Mulcahy & Gibson, 164 App. Div. 829), but if the contractor furnishes such appliances the employer does not thereby become responsible for their sufficiency. They are no part of the employer's plant; he is under no absolute duty to furnish them and the statute has no application."

Here, the sign and the scaffold were fixed fixtures of the respondent's building and its plant.

In *Duggan* v. *National Constructors & Engineers*, 223 App. Div. 163; 228 N. Y. S. 126, the Court unanimously said at pages 129 and 130:

> "These ladders constructed by the Masten Company were at the place in question the sole means of getting up and down through the building * * *.
>
> The defendant Masten Company owed a duty to all the employees, whether its own or others rightfully on the premises, who used the ladder to the knowledge of the defendant, or its superintendent in charge with its implied consent. An obligation under the circumstance here disclosed arises in an owner or contractor who erects a ladder to anticipate that it will be used by persons engaged in occupations in the construction of the structure, but not in his employ. Where the nature of the construction and the commingling of the employees in a common object at the time of the erection of a ladder requires it, a person who constructs a

> scaffold or erects a ladder to be used in the performance of labor in the erection of a building has a duty incapable of delegation, not merely to his own employees, but to all others making use of the structure for that purpose, to make such instruments of performance safe. The mere fact that it was sued by one not an employee of the defendant does not discharge the latter of liability, where a duty exists of making a safe scaffold or ladder for use of employees in the performance of the work. In the situation here defendant ought to be held to have foreseen, or to have been obliged to foresee, that the ladder was to be used as plaintiff so used it at the time of its collapse."

Compare liability of property owner to invitees, such as plaintiff's deceased, defined in Restatement, Torts, secs. 343, 412.

Conclusion

That because the majority of the Court of Appeals had no power under Rules of Civil Procedure to grant judgment to respondent, this Court in the exercise of its judicial supervision over the lower federal courts is requested to summarily order rehearing of petitioner's appeal *en banc* before the Circuit Court of Appeals or, in the alternative, to grant a writ of certiorari to said Circuit Court of Appeals because of the importance of the question of liability to the millions of employees by negligent land owners employing independent contractors.

Dated, New York, New York, July 29, 1964.

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